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**Datasheet for the decision
of 21 July 2015**

Case Number: T 0283/13 - 3.2.07

Application Number: 09172685.1

Publication Number: 2308762

IPC: B65D5/32

Language of the proceedings: EN

Title of invention:
Tray and hood package

Applicant:
The Procter & Gamble Company

Headword:

Relevant legal provisions:

EPC Art. 108
EPC R. 99(2)

Keyword:

Admissibility of appeal -
appeal sufficiently substantiated (no)

Decisions cited:

T 1704/06

Catchword:



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Case Number: T 0283/13 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 21 July 2015

Appellant: The Procter & Gamble Company
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 19 July 2012
refusing European patent application No.
09172685.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman H. Meinders
Members: K. Poalas
C. Brandt

Summary of Facts and Submissions

- I. The appellant (applicant) lodged an appeal against the decision to refuse European patent application 09 8172 685.1.
- II. In the decision it was held that the application according to the then main request (claims as originally filed) and the then first to fourth auxiliary requests does not comply with the requirements of Article 83 EPC.
- III. In its statement setting out the grounds of appeal the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request, or alternatively, on the basis of one of the first to fifth auxiliary requests, all filed with said statement.
The main request and the first to fourth auxiliary requests were identical with the corresponding requests forming the basis of the refusal.
- IV. In its communication pursuant to Article 15(1) RPBA and annexed to the summons for oral proceedings set for 21 July 2015 the Board gave the reasons why it considered the present appeal as being inadmissible, see points 2 and 2.1 to 2.6 of said communication.
- V. With its submission dated 20 July 2015 the appellant withdrew the above-mentioned main and first to fourth auxiliary requests and requested that the decision under appeal be set aside and that a patent be granted on the basis of the above-mentioned fifth auxiliary request, now being the (sole) main request. Alternatively, the appellant requested that the case be remitted to the Examining Division for proper consideration of the Article 83 EPC objections. It informed the Board that

the applicant will not be represented at the oral proceedings.

- VI. Oral proceedings before the Board took place as scheduled on 21 July 2015.

Since the duly summoned appellant, as announced with its above-mentioned submission did not attend, the oral proceedings were continued without the appellant according to Rule 115(2) EPC and Article 15(3) RPBA.

- VII. The appellant's arguments as far as it concerns the admissibility of the appeal can be summarised as follows:

The two features discussed during the oral proceedings before the Examining Division with respect to the requirements of Article 83 EPC, namely the "side gap" and a minimum value for the height of the "top gap", said last being in the view of the Examining Division important to obtain the inward bending effect recited in claim 1, have been introduced into claim 1 of the fifth auxiliary request.

In addition, in the statement setting out the grounds of appeal it was indicated that the amendments of claim 1 of said fifth auxiliary request "address any objections under Article 83 EPC".

The admissibility of the appeal should not be dependent on the strength or otherwise of the grounds of appeal.

Accordingly, the appeal is admissible.

Reasons for the Decision

1. Although the appellant did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that requirement only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO, see also the Case Law of the Boards of Appeal, 7th edition 2013, section IV.E.4.2.3.c)).
2. *Admissibility of the appeal*
 - 2.1 Article 108, third sentence, EPC provides that "[w]ithin four months of notification of the decision, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations". Pursuant to Rule 99(2) EPC, "[i]n the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based".
 - 2.2 Under the established jurisprudence of the Boards of Appeal the statement of grounds of appeal should specify the legal and/or factual reasons on which the case for setting aside the decision is based. In other words, it must be clear from this statement why in the appellant's opinion the contested decision is either **incorrect** or **no longer applies** to the amended claim sets filed with the grounds of appeal, see also the Case Law of the Boards of Appeal, 7th edition 2013, section IV.E.2.6.5.b).
 - 2.3 The only question to be decided in the present case with regard to admissibility is whether the statement setting out the grounds of appeal complies with the requirements

discussed above.

- 2.4 The impugned decision refuses the application on the basis of non-compliance with Article 83 EPC, see point II.2 of the reasons.
- 2.5 In the statement setting out the grounds of appeal the appellant does not set out why the impugned decision was flawed in this respect, with the main and first to fourth auxiliary requests being identical with the ones refused in the impugned decision. By the same token, neither the amendments in claim 1 of the fifth auxiliary request, nor the subject-matter of that claim as a whole, was discussed in respect of Article 83 EPC.
- 2.5.1 More specifically, the relevant parts of the statement of grounds provide only arguments why the subject-matters of the claims of the main and first to fourth auxiliary requests involve inventive step (Article 56 EPC) and comply with the requirements of Article 123(2) EPC.
- 2.5.2 The part of the statement of grounds headed "5th Auxiliary Request" consists of two paragraphs. The first paragraph gives the basis for the amendments (Article 123(2) EPC). The second paragraph states that the amendment "provides a detail about the package and the plurality of products contained which makes the functioning of the invention very clear and they also **address any objections under Article 83 EPC**" (emphasis added by the Board).
- 2.5.3 The Board considers that said appellant's statement concerning insufficiency of disclosure (Article 83 EPC)

is mainly a declaration without any supportive argument.

2.6 The appellant argues in its letter dated 20 July 2015 that two of the issues discussed during the oral proceedings before the examining division in respect of Article 83 EPC, namely the "side gap" and a minimum value for the height of the "top gap", have now been introduced into claim 1 of the fifth auxiliary request, addressing thereby also the Article 83 EPC issue. The introduction of said features into claim 1 should render the appeal admissible.

2.7 The Board cannot follow this argument for the following reasons:

2.7.1 In theory, it could be possible that the amendments, by themselves and in connection with the rest of the features already at first sight solve all issues of sufficiency of disclosure. In that respect, reference should first be had to the impugned decision.

In the impugned decision the following concrete objections have been *inter alia* raised:

2.7.2 "Claim 1 **lacks several essential features** necessary for defining the invention. i.e., for defining the matter for which protection is sought. For example, **no gap (side gap)** is defined ..., **no rigidity of the carton** and, even more importantly, the **top gap G is not limited** in any way..." (emphasis added by the Board), see page 4, second paragraph;

2.7.3 "... a more serious issue ... is the consequential reference to the inward bending of the side panels 32, 33 present also in all the requests. **Nowhere** in the application is there **any explanation of this inward**

bending ... there is **no reason** why the inner panels 32, 33 **would bend only inwardly**" (emphasis added by the Board), see page 4, fifth paragraph;

2.7.4 "... **the height at which the adhesion** between the outer side panels 22, 23 and the inner side panels 32, 33 is **carried out** is not mentioned anywhere in the application" (emphasis added by the Board), see page 4, sixth paragraph.

2.7.5 The objection raised under point 2.7.2 above refers *inter alia* to the lack of information concerning the rigidity of the carton. Although claim 1 of the fifth auxiliary request has been amended to include additional information on the top and side gap, no information concerning the rigidity of the carton is present in the claim. The appellant did not set out why the decision was flawed in this respect.

2.7.6 The objections raised under points 2.7.3 and 2.7.4 above refer to the fact that the inner side panels do not inevitably bend inwardly under the claimed load conditions. It is unclear how the presence of the additional features of claim 1 of the fifth auxiliary request concerning the top gap and the side gap excludes a bending of the inner side panels other than inwardly.

The amendments, by themselves nor in combination with the other features of claim 1, therefore do not provide any information related to the issue of Article 83 EPC. The Board therefore considers that the appellant did not set out why the impugned decision was flawed in that respect.

2.8 Without such arguments the Board would have to establish, for the appellant, what its case regarding

sufficiency of disclosure (Article 83 EPC) would be. This goes, in the present case, beyond its duties.

Because this ground constitutes the basis for the refusal of the application, it was not sufficient to only make submissions in relation to Articles 56 and 123(2) EPC.

- 2.9 In its letter dated 20 July 2015 the appellant argued that the admissibility of the appeal "is not dependent on the strength or otherwise of the grounds of appeal". In the present case, this is beside the point.

The first requirement for an admissible appeal is here that the case the appellant is trying to make can be understood "as such".

That is the requirement which is not fulfilled.

- 2.10 For the above reasons, the Board finds that the appeal is inadmissible.

Given that the appeal is found inadmissible, the Board cannot even consider the appellant's auxiliary request for remittal of the case to the Examining Division.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



M. Kiehl

H. Meinders

Decision electronically authenticated